RAI Research Corporation *and* Local 424, United Brotherhood of Industrial Workers. Cases 29-CA-7071, 29-CA-7110, and 29-RC-4446

August 24, 1981

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On July 7, 1980, Administrative Law Judge James F. Morton issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief. On November 21, 1980, the National Labor Relations Board issued an unpublished order reopening the record and remanding the proceeding to the Regional Director for further hearing, in which it ordered that the hearing be reopened to allow Respondent to cross-examine witness Bruce Terry regarding Respondent's alleged unfair labor practices. The supplemental hearing for this purpose was held on January 20, 1981, and on March 27, 1981, the Administrative Law Judge issued the attached Supplemental Decision. Thereafter, Respondent filed further exceptions and a brief in support of these exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached decisions in light of the exceptions[1] and briefs and has decided to affirm the rulings,[2] findings,[3] and conclusions[4] of the Administrative Law Judge and to adopt his recommended Order,[5] as modified herein.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified and set out in full below, and hereby orders that the Respondent, RAI Research Corporation, Hauppauge, New York, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interrogating employees as to whether they support Local 424, United Brotherhood of Industrial Workers, and urging employees to sign petitions indicating that they are opposed to Local 424.

(b) Threatening to close or to move its plant to discourage employees from supporting Local 424.

(c) Permitting employees opposed to Local 424 to solicit coworkers during working time to join with them in rejecting Local 424, while at the same time restricting employees who favor Local 424 from soliciting support for Local 424 among coworkers.

(d) Threatening employees with arrest or discharge to discourage their support for Local 424.

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[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent also excepts to the Administrative Law Judge's finding in his Supplemental Decision that the hiatus between the direct examination and cross-examination of Terry with respect to Respondent's unfair labor practices had no impact on the ultimate merits of the case. In this regard, Respondent contends, in essence, that the Administrative Law Judge failed to consider adequately the merits of the evidence derived from the reopened hearing in his Supplemental Decision because he did not wish to reverse his previously published Decision. We disagree.

The record in the supplemental hearing reveals no evidence which would require conclusions different from those arrived at by the Administrative Law Judge. We find that the Administrative Law Judge fully considered and properly analyzed all evidence presented in this case. Accordingly, we find that no prejudice to Respondent resulted from the hiatus between the original hearing and the supplemental hearing, and, therefore, that Respondent's exception is without merit.

[2] Respondent excepts to the Administrative Law Judge's failure to grant its application to strike all of the testimony of witnesses Bruce Terry and Al Constantine for alleged misconduct related to these proceedings. Respondent contends that Terry violated the Administrative Law Judge's instructions on November 26, 1980, to avoid discussing his testimony with anyone during the course of the hearing. Respondent notes that employee Carol Mula testified that Terry visited her at her home on November 26, 1981, and briefly mentioned during the course of conversation that he had testified that day regarding employee signatures on union authorization cards. The Administrative Law Judge stated at the hearing that this insignificant discussion did not violate the restrictions he placed on Terry. We agree with the Administrative Law Judge.

Respondent further contends that Union Organizer Constantine intentionally destroyed authorization cards in his possession which Respondent planned to use to bolster its theory that Terry misdated several of the cards. Constantine testified at the hearing that he had not seen the relevant cards for 8 or 9 months. Respondent presents us with no evidence of misconduct by Constantine other than its bare assertion to this effect.

Accordingly, we find Respondent's exceptions to be without merit.

[3] We agree with the Administrative Law Judge's finding that Terry's display in the windshield of his automobile of a sign reading "Please Don't Feed the Management. They only Suck Blood" constituted protected activity under Sec. 7 of the Act, and, therefore, Respondent's discharge of Terry for this activity violated Sec. 8(a)(3) and (1) of the Act. However, we do not rely on the Administrative Law Judge's finding, in his original Decision, that one of the reasons for Terry's use of the sign was to protest being threatened with arrest by Respondent's vice president, D'Agostino. As noted in the Supplemental Decision, D'Agostino's threat to arrest Terry did not occur until March 9, the day after Terry displayed the sign.

[4] The Administrative Law Judge found that Respondent's president, Arditti, solicited employee Lowitt's signature on an antiunion petition. Although the complaint does not specifically allege this conduct to be a violation of the Act, the issue was fully litigated at the hearing and the record fully supports the finding of a violation. Therefore, we find that Respondent's solicitation violated Sec. 8(a)(1) of the Act, and we amend the recommended Order and notice accordingly.

[5] Member Jenkins would compute interest on Bruce Terry's backpay in the manner set forth in his partial dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980).

As found by the Administrative Law Judge, on March 22, 1980, the Union represented a majority of the employees in the bargaining unit. On that date, the Union sent a telegram to Respondent requesting recognition. Accordingly, Respondent's obligation to bargain with the Union stems from that date.

(e) Discharging employees because they support Local 424 or engage in activities protected by Section 7 of the Act.

(f) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action:

(a) Offer Bruce Terry immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and make him whole in the manner set forth in the section of the Administrative Law Judge's Decision entitled "The Remedy" for all wages and other money and benefits he lost as a result of its having discharged him on March 9, 1979.

(b) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due Bruce Terry under the terms of this Order.

(c) Upon request, bargain with Local 424, United Brotherhood of Industrial Workers, as the exclusive collective-bargaining representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees employed by the Employer at its Hauppauge, New York, plant, including employees assigned to its Permion and EMC Division in the following classifications: Production workers, QC technicians, R & D technicians, building maintenance, equipment maintenance and assembly operators, but excluding all office clerical employees, technical employees, sales employees, professionals, guards and supervisors as defined in the Act, including foremen and all other employees of the Employer.

(d) Post at its offices in Hauppauge, New York, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 29, after being duly signed by Respondent's representative, shall be posted by it immediately upon receipt thereof, and be maintained by it for 60 days consecutively thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 29, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the allegations of the complaints which are referred to under section A, paragraph 4, of the Administrative Law Judge's Conclusions of Law be, and they hereby are, dismissed.

IT IS FURTHER ORDERED that, with respect to Case 29-RC-4446, Objections 3, 5, and 10 be, and they hereby are, overruled; Objections 6, 7, 9, and 12 be, and they hereby are, sustained; the results of the election held on February 7, 1979, be, and they hereby are, set aside; and, as no question concerning representation now exists in Case 29-RC-4446 in view of the order above requiring Respondent to bargain with Local 424, the petition therein be, and it hereby is, dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT interrogate employees as to whether they support Local 424, United Brotherhood of Industrial Workers, or urge employees to sign petitions indicating that they are opposed to Local 424.

WE WILL NOT threaten to close or to move our plant to discourage employees from joining or supporting Local 424.

WE WILL NOT permit employees opposed to Local 424 to talk to coworkers during working time to persuade them to oppose Local 424, while at the same time restricting employees who favor Local 424 from talking to coworkers to obtain support for Local 424.

WE WILL NOT threaten employees with arrest or discharge to discourage membership in Local 424.

WE WILL NOT discharge employees because they support Local 424 or because they engage in activities protected by Section 7 of the Act.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exer-

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

cise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer Bruce Terry immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to his seniority or other rights and privileges previously enjoyed, and WE WILL make him whole, with interest, for all wages and other moneys and benefits he lost as a result of his unlawful discharge.

WE WILL, upon request, bargain with Local 424, United Brotherhood of Industrial Workers, as the exclusive collective-bargaining representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All production and maintenance employees employed by the Employer at its Hauppauge, New York, plant, including employees assigned to its Permion and EMC Division in the following classifications: Production workers, QC technicians, R & D technicians, building maintenance, equipment maintenance and assembly operators, but excluding all office clerical employees, technical employees, sales employees, professionals, guards and supervisors as defined in the Act, including foremen and all other employees of the Employer.

RAI RESEARCH CORPORATION

DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: These consolidated cases were heard in Brooklyn and in Hauppauge, New York, on various dates in November and December 1979 and January 1980. Local 424, United Brotherhood of Industrial Workers (herein called the Union), lost the election which was held in Case 29-RC-4446 among the production and maintenance employees of RAI Research Corporation (herein called Respondent). The Union filed objections to the conduct of that election. Some of its objections were consolidated for hearing with the alleged unfair labor practices set out in the complaints which issued in Cases 29-CA-7071 and 29-CA-7110. All but one of the objections so consolidated are based on the same factual allegations set out in the unfair labor practice cases. The issues are:

(a) Whether Respondent discharged its employee Bruce Terry because of his activities on behalf of Local 424 or because of other activities protected by Section 7 of the National Labor Relations Act, herein called the Act.

(b) Whether it transferred an employee, Ward Ciappetta, to less agreeable work because of his activities on behalf of the Union.

(c) Whether it interrogated, promised benefits to, threatened or coerced its employees to induce them to withdraw their support for the Union.

(d) Whether it blamed the Union for two fires of undetermined origin that occurred shortly before the election, arranged to have the local police interrogate union supporters thereon, told its employees that it would move to another location if there was another such act of violence, and created a general atmosphere of fear and confusion as to render impossible the free choice of a bargaining representative.

(e) Whether it allowed two employees who opposed the Union to campaign against the Union during working time but barred prounion employees from soliciting support for the Union on its premises.

(f) Whether it indicated to its employees that it was futile for them to vote for the Union.

(g) Whether the Union represented a majority of employees when it demanded recognition.

(h) Whether any conduct found to have been committed by Respondent so impeded the election processes as to warrant the issuance of a bargaining order as a remedy, should it be found that the Union had been selected by a majority of the unit employees to represent them.

I have considered the entire record in these cases, the oral argument made at the hearing by the General Counsel, the brief filed by Respondent, and the demeanor of the witnesses at the hearing. Based on these considerations, I make the following:

FINDINGS OF FACT

I. JURISDICTION

Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and the Union is a labor organization as defined in Section 2(5) of the Act.[1]

II. THE ALLEGED UNFAIR LABOR PRACTICES[2]

A. *Background*

Respondent began operations over 15 years ago performing research and development work. In the past 5 years, its operations have been converted principally to the manufacture of permeable membranes used in batteries and for industrial application. That function is performed by its Permion Division. Respondent has two other divisions—the Electromation Division which manufactures ultrasonic equipment and its Technical Service Division which is engaged in the design engineering of

[1] These findings are based on the pleadings in Cases 29-CA-7071 and 29-CA-7110 and the Stipulation for Certification Upon Consent Election approved in Case 29-RC-4446.

[2] The findings of fact in this section will encompass those relevant to the related objections in Case 29-RC-4446. The Union's contentions in Objection 6 are not alleged as an unfair labor practice but were consolidated in the Report on Objections with the Union's Objection 7, the basis of which has been alleged as an unfair labor practice.

electronic components. Its plant is located in Hauppauge, Long Island, New York.

In late 1978, as discussed in more detail below, one of its employees, Bruce Terry, obtained authorization cards from the Union and began to organize the production and maintenance employees of Respondent who were unrepresented. On January 12, 1979 (all dates hereafter are for 1979 except as otherwise stated), the Union filed a petition in Case 29-RC-4446 seeking an election among the production and maintenance employees of Respondent. On January 24, a Stipulation for Certification Upon Consent Election was approved in that case. The election was held on February 7. The tally of ballots reflects that, of the approximately 64 eligible voters then in the production and maintenance employees unit, 37 voted against representation and 21 voted for the Union. The Union subsequently filed the objections and the unfair labor practice charges upon which the hearing in this case was held.

B. *The Burning Bush Incident and the Alleged Related Threat by Respondent To Move Its Plant*

The discussion of the matters under this heading is taken out of chronological sequence since it pertains to a major credibility issue, the resolution of which is a factor in determining other issues in this case.

The complaint in Case 29-CA-7110 alleges, *inter alia*, that Respondent, by its vice president, Charles Lipari, threatened its employees with reprisals if they selected the Union as their bargaining representative. The Report on Objections in Case 29-RC-4446 directed that a hearing be held, *inter alia*, as to the Union's Objections 6 and 7. In the discussion thereon in that report, it was noted that the Union had presented evidence, during the administrative investigation of its objections, that on the day of the election, February 7, Respondent's vice presidents, Lipari and Vincent D'Agostino, told a unit employee that one of its employees had started a fire outside Respondent's plant on February 6 and that Respondent would close its plant and move elsewhere if the employees committed one more act of violence. The Report on Objections also noted that the Union had submitted evidence that Respondent had called in the local police on February 7 to question four of its employees who headed the Union's organizing effort concerning any involvement they may have had in setting that fire and that the police then threatened them to discourage them from starting any fire and also interrogated them respecting the outcome of the election scheduled to be held later on February 7. Respondent's answer filed in Case 29-CA-7110 denies that it threatened to close its plant and the Report on Objections notes that Respondent asserted that it simply cooperated with the local police who were conducting an arson investigation. Respondent denied that it blamed the fire on the Union or its employees.

The Report on Objections further related that it was undisputed that, on the night of February 5, a fire was discovered in the bushes in front of Respondent's plant and that, on the night of February 6, a second fire was discovered in a garbage bin located outside Respondent's plant. Presumably, that statement was based on statements contained in an affidavit of Respondent's president, Sol Arditti, which was received in evidence at the hearing. Therein, Arditti responded to the Union's Objection 6 by stating that there were two fires around Respondent's property, the first on February 5 in the shrubs in front of the building and the second in the garbage bin around midnight, the night before the election. In his affidavit, Arditti stated that the first fire had been extinguished "by the Company" and that when the fire department arrived the firemen told him it was an arson attempt. He stated that the police arrived shortly afterwards and wrote a report. He also stated in that affidavit that he learned on the morning of February 7 of the fire in the garbage bin when his building and maintenance supervisor, Edward Zito, told him of it.

At the hearing in this case, the dates of these two fires were in considerable dispute, notwithstanding the statement in the Report on Objections that the dates of these fires were not in dispute. In particular, Respondent's witnesses testified that the fire in the garbage bin occurred first and that it took place on February 4, not February 6; further, its witnesses stated that the brush fire took place right outside Arditti's office about noon on February 7, the day of the election, and not on February 5. Respondent maintained, at the hearing, that the occurrence of the brush fire on February 7 was the reason it called the local police, that it was in response to the police investigation that it disclosed to the police that the election in Case 29-RC-4446 was set for later that day, that it identified four of its employees to the police as the leaders of the Union's organizing drive only after the police asked for their names, and that it honored the police request to talk privately with those employees on the morning of February 7. The General Counsel and the Union contend that there was no brush fire outside Arditti's office on the morning of the day of the election. They contend that the brush fire occurred on February 2 (not February 5 as recited in Arditti's affidavit and in the Report on Objections and not on February 7 as Respondent contends). The General Counsel and the Union further contend that Respondent seized upon the garbage bin fire on midnight, February 6, as a pretext to subject the employees who led the Union's organizing efforts to police interrogation and to underscore Respondent's threat to close its plant and to move it elsewhere in furtherance of its effort to dissuade its employees from voting for the Union.

In support of those contentions, the General Counsel and the Union proffered the testimony of two witnesses, Bruce Terry and Ward Ciapetta. They testified that they solicited the authorization cards used by the Union as its showing of interest in support of the petition it filed on January 12 in Case 29-RC-4446 and that they had observed, when they reported for work on the morning of Wednesday, February 7, that the garbage bin outside the plant was charred, apparently from a fire that occurred during the preceding night. Terry testified that Vincent D'Agostino (one of Respondent's vice presidents) and Charles Lipari (its other vice president) came over to where he and Ward Ciapetta were working and that D'Agostino said that he thought one of the employees

set the fire. Terry replied that "management set the fire" and quoted Lipari as telling him that, if there was one more act of violence by an employee, he would have to shut down the plant and move somewhere else. Ciapetta testified that his recollection was that D'Agostino came over to him and said it (setting the garbage bin fire) was a foolish thing for somebody to do and that, if things of this nature continued, they (Respondent) would have to close the plant.

Terry and Ciapetta further testified that, at or about noon that day, February 7, they and two other employees, David Grijalva and Mary Anne Mann, were summoned to report to the library in Respondent's plant where they met a police lieutenant and a police officer from Suffolk County, New York. The police lieutenant told them that he had been speaking to management and that he was told that the union supporters were suspects in setting the fire. Terry replied that no one who supported the Union could have set the fire because they were not the type to commit an act of violence. Terry said that the police then said that they could shoot anyone caught setting a fire and that this was one of eight reasons a police officer could have for shooting an individual. On cross-examination, Terry conceded that the affidavit he gave to the Board agent prior to the hearing contained no reference to such a statement but he insisted that the statement was made by the police. The police then told the four employees "to keep the union people in line." Terry responded by saying that management had been harassing the employees with threats to fire employees and the like and he suggested that, in view of that pattern, maybe D'Agostino set the fire. The police, according to Terry, replied that 99 percent of the time a fire was started under such circumstances "the people supporting the Union started the fire." Terry asked how many arson cases were solved and the police said very few were. (Terry observed at the hearing that this answer bothered him since it appeared to contradict the earlier statement by the police that 99 percent of such fires were started by union people but it appears he made no remark thereon to the police). At that point, according to Terry, the lieutenant asked how close the vote would be in the union election to be held that day and Terry told him a majority supported the Union. The lieutenant asked him what would happen if the vote was 33 to 32 for the Union and Terry stated that he replied that "we win." The lieutenant asked if there would be a strike if the Union lost. Terry's account is that he said the Union expected to win and that the lieutenant told him that he did not want any trouble and, if there was any, he would look Terry up at his home. Terry further testified that the lieutenant said he had met the Union's organizer, Al Constantine, a couple of times before, that Constantine would promise the world and that the Company could fire Terry any time they wanted to. Terry quoted the lieutenant as saying that any idea they might have that they had any kind of legal protection against being discharged was a bunch of nonsense, to paraphrase the testimony, and that the lieutenant said he based this on the fact that he had been in business in the past. Terry stated that the discussion began at 11:45 a.m. and ended about 12:20 p.m. and that, from then and until the election later that day, about 13 other employees who had asked about the interview with the police were outraged when they heard from Terry what had happened.

Ciapetta testified that the meeting with the police lasted about a half hour. He said the lieutenant told them that there was a fire in the dumpster, i.e., the garbage bin, and he wanted to know if they had anything to do with it. He recalled that the lieutenant asked questions such as how close would the election be and would there be a strike if the Union lost. He also said the lieutenant told them that, if the police saw anyone setting a fire, "it was grounds to shoot."

Respondent's vice president, D'Agostino, specifically denied the allegation in Objection 7 that he stated to employees that "one more act of violence by the Union and the Employer will move to a new location." He said that there were two fires of undetermined origin prior to the election, the first one in the garbage bin on Sunday, February 4, and that he learned of this on Monday morning, February 5, when the building superintendent, Ed Zito, told him that the fire department had notified him of that fire and of another similar fire down the road at another place. He said that Zito told him that the fire department remarked that "it must have been a bunch of kids" who started the dumpster fires. D'Agostino further testified that he asked people in the plant if they knew anything about the dumpster fire and that, when he got up to where Terry and Ciapetta were working, he asked them too. Terry told him excitedly that the Union did not start the fire but that management did. He said that Ciapetta then calmed Terry down.

D'Agostino testified as follows respecting the events of the morning of February 7. He and Vice President Lipari were with Respondent's president, Sol Arditti, in Arditti's office at or about 9:30 to 10 a.m. that morning when they observed a lot of smoke on the front lawn and that the bush right in front of Arditti's office was on fire. The fire department was called and while he, Lipari, and Arditti waited outside, an employee, Gary Duprey, put out the fire with a fire extinguisher. When the fire department came, D'Agostino testified that "we" rustled through the underbrush and found paper toweling similar to that used in the plant and brought the toweling into the building. It was shown to the fire department official who had come and he told them it looked like arson and when Respondent asked what could be done about it, the fire department official suggested that the police should be called.

D'Agostino further testified that the police were called and, when they came, they asked if anything was different at the plant then. They were told that the Union was trying to come in. The police officer asked who were the active people in the Union and was told by Respondent that Terry, Ciapetta, David Grijalva, and Mary Anne Mann were. The police officer said he wanted to talk to those four privately and arrangements were made for him to use the library for that purpose. When the police finished talking with those four employees, they returned to the office. D'Agostino stated that he has no recollection of what was said then.

Charles Lipari, another vice president of Respondent, testified as follows respecting the two fires. He learned from Ed Zito, Respondent's maintenance supervisor, on Monday, February 5, that there had been a fire in the garbage bin the previous night. On the morning of February 7 at or about 10 a.m. he was in the office of Respondent's president with Arditti and D'Agostino when he observed the bush outside on fire. One of the laboratory employees ran out with a fire extinguisher and reduced the fire to the point where it was just smoldering. The fire department arrived a few minutes later and put the fire out. The firemen removed plastic and toweling material from under the bush, commented that it was an arson attempt, and suggested that the police be called in. Lipari's subsequent account parallels D'Agostino's except that he recalled that, when the police finished talking to the four employees in the library, they returned to Arditti's office and were asked what they found out. They told Respondent that the employees had been made aware of the fact that possible acts of violence on their part would be criminal actions. The police also stated that they would file a report. Lipari denied that he told any employees that Respondent would move its plant if there was another act of violence. On cross-examination, Lipari answered in the affirmative when asked if he considered an attempt by an employee to get a union in the plant to be an attempt to damage Respondent's performance. On re-direct examination, he answered this same question in the negative, and explained that he had misunderstood the tone of the venue "of the question asked him on cross-examination. Respondent took no steps to have the police talk to any employees other than the four union activists.

Respondent's maintenance manager, Ed Zito, testified that the Hauppauge fire marshal had called him in the morning after the fire in the garbage bin to tell him about it and about another fire nearby but he, Zito, could not recall what day that was. He testified he reported this to company management that same day. He could not recall whether there was any other fire at the plant in the week of the election.

Respondent's president, Sol Arditti, testified that Ed Zito told him about the first fire which occurred in the week of the election and specifically that he, Zito, was notified by the Hauppauge fire department that there had been a fire the previous night, i.e., February 4 or the early hours of February 5, in the garbage bin outside Respondent's plant and that there had been other similar fires at other plants that night in the industrial park where Respondent's plant is situated. According to Arditti, the second fire that week took place in a juniper bush outside his office at or about 10 a.m. on February 7. An employee put it out. When the firemen arrived a few minutes later, the fire chief came into the plant and said that the fire was out by the time he arrived. The fire chief left to inspect the area where the fire occurred and came back with singed paper and plastic and suggested that the police be called as arson was a very serious matter. The police were called and Arditti told the two policemen who arrived that the fire department had previously been there and indicated that there was an arson attempt. He states he also reported that Respondent had a previous fire in the garbage bin two nights before. The police asked to speak to the employees who were engaged in the union activity after he told them, in response to their questions as to whether anything unusual was going on, that there was a union election scheduled for later that day. When the police returned to Arditti's office from interviewing the four employees, they simply said that there would be no further problem.

Respondent called Sergeant Raymond Peterson of the Suffolk County Police Department who testified on direct examination as follows. He and Officer Charles Ellenger were called to Respondent's plant on February 7 and were told by Respondent's president that there had been, on that day, two minor fires in the bushes on the right front of the building and that Respondent had been informed by the Hauppauge fire department that there had been several dumpster fires in the preceding days. He asked Arditti if there was any specific thing going on which would lead Arditti to believe that there was something wrong. Arditti said that some of his employees were attempting to organize a union. Peterson asked if there was any problem with that. Arditti said the people were pretty well satisfied and that some of the older employees were starting to get a bit upset by some of the actions of some of the people trying to organize the Union. Peterson asked if it would do any good if he spoke to the people. Respondent's officials said they thought there was a possibility that the fires might have been set by some of the union people. Peterson asked to speak to the main employees involved with the Union and arrangements were made for him to use the library for that purpose. There, he spoke to Terry, Ciapetta, Grijalva, and Mann. He began by telling them that he was not there to come down on them or play bad guy and that he belonged to police department unions. He also told them that he and Officer Ellenger were there on specific complaints by Respondent that there had been suspicuous fires and that he understood there were union organizing activities going on. Peterson informed the four employees that he was told that they were the leaders of the organizing activity and that he was speaking to them to find out what was going on. He stated he was told, in response, that there had been a few minor disputes, that the Union was having a hard time organizing, and that an election was set that day for 3 p.m. Peterson asked them if there was going to be any specific problem and was told there would not be. He said that he told them there was a question as to whether or not they were involved in the fires and that the employees responded that they were not but thought perhaps that management was setting the fires to discredit them. He told them arson was a crime the police could stop by shooting. He testified that he left when the employees appeared to be satisfied and after they assured him that their "people" would not cause any damage to cars or buildings. He returned to Arditti's office who then told him that an election was set for 3 p.m. that day. He also informed Arditti that arson was the type of offense that could be stopped by shooting. Arditti asked if he knew of any police officers who could do security work "off the book" or on off-duty time. The conversation ended

when he told Arditti that he could call his precinct commander to get officers for private guard duty and that several officers had their own security agencies. On cross-examination, Peterson stated he filed a report with his supervisors later that day as to his visit to Respondent's plant. The report had the Union's name and address and also the Union's organizer's name, Al Constantine, on it. Peterson testified that he believed one of the four employees who were in the library gave Officer Ellenger that information. The report he filed was received in evidence. It is a form used by the Suffolk County Police, captioned "Report and Labor Dispute." It recites, *inter alia*, in boxes provided on the form that there is no strike and that the reason for the dispute is "Attempt to organize Company." Under "Details" thereon are noted the names and addresses of the four employees he talked to in the library, and under "Observations" he wrote that Respondent "reports that two fires have occurred outside the building in the past week and there is some uneasiness in the company," that a union election will be held at 1500 hours on March 7, 1979, and that the organizers named above in that section and management were counseled as to their conduct of further activity.

The General Counsel called Henry Seuling who had been captain of the Hauppauge volunteer fire department in 1979 and who has been employed by the Long Island Lighting Company. He testified that there was a bush fire outside the front entrance of Respondent's plant about noon on February 2 and that there were dumpster fires on the night of February 6 at plants in the area, including one at Respondent. He produced a report he had prepared as to the February 2 fire. On cross-examination, he testified that he had not prepared that report of the February 2 bush fire on February 2 but had written it a few weeks prior to his being called as a witness. He stated that he could not find the original of the report but prepared that report from data contained in a log kept by the fire department and as supplemented by his recollection. Under further examination by Respondent, he testified that he had prepared another report of a bush fire and that a revision of it was given to Respondent. That latter report, received in evidence, indicates that the bush fire occurred on February 7. Seuling explained the circumstances of his preparing that report as follows. About 2 weeks before he was called to testify, he received a call from a woman employed by Respondent, later identified as Linda Vacchese, administrative assistant to Sol Arditti. She told him she would like to get a copy of the report for the bush fire on February 7. (Vacchese's testimony corroborates this and substantially the rest of his testimony respecting the preparation of that report.) He told her he remembered the fire and would get the report for her when he had a chance to look for it. He was unable to locate the original report. It appears that he checked the log for February 7 and saw no reference on it to "RAI" and he assumed then that he had overlooked making a entry of the fire. As he remembered that there had been a bush fire, however, he wrote up a report which he inadvertently dated February 9. (He assigned a fictitious docket number, 279, to it. The log kept by the Hauppauge fire department is numbered consecutively beginning with 1 for the first fire of its fiscal year beginning April 1. By February 1979, the numerical references in the log were in the 500's as over 500 fires had occurred in Hauppauge since April 1, 1978.) Seuling was then told by telephone by one of the volunteers that he had placed the wrong date, i.e., February 9, on that report. Another individual in the fire department rewrote the report, dated it February 7, and gave it to Vacchese. The hearing then was recessed so that Seuling could get the log and related data. When he returned to the hearing, he brought the log and also the original report of the bush fire which had been located in the interim. He earlier had brought with him the original of the report for the February 6 dumpster fire. These reports which Seuling testified were the original ones show that a type #12 fire occurred on February 2 at 1155 at the location "215 Marcus," telephone number 276-2000, that the fire had been reported by a firm, Computers, which leases space from Respondent at one end of the building and that the probable cause was "Labor Relations in plant—started bushes on fire." Seuling testified that he obtained the Computer's name, address and telephone number from the Smithtown dispatcher (Hauppauge is part of the town of Smithtown) but that he put the other information on the report from his own observations.

Respondent called Dwayne Melli as its last witness respecting fires outside Respondent's plant in the winter of 1978-79. Melli is employed by Current Components Inc., a firm which leases space from RAI at its building in Hauppauge. Component's address is 215 Marcus Boulevard whereas Respondent's is 225 Marcus. He testified that about a year before the hearing in this case, i.e., January or February 1979, he observed a fire raging outside the section of the building leased to Current Components and that Hauppauge firemen were occupied in putting it out.

The basic contention urged by the Union in its Objections 6 and 7 is that Respondent threatened its employees that it would move if the Union caused "another" act of violence and that Respondent underscored this threat by bringing in the local police on the morning of the day of the election to talk to the employees who led the Union's organizing drive. In effect, it is asserting that Respondent seized upon these fires as a pretext to harass the Union and, in that regard, the Union urges that there was no bush fire outside Arditti's office on the morning of February 7. The General Counsel takes the same position to buttress his contention that Respondent violated Section 8(a)(1) by threatening employees that it would move in order to discourage support among Respondent's employees for the Union. Respondent argues that none of its officials threatened that its plant would be moved and that it simply complied with the request of the Suffolk County police to permit them to talk to the four employees who supported the Union about the bush fire outside its plant on February and the dumpster fire on February 4. The underlying issues that are critical to the proper evaluation of these contentions are whether the bush fire that occurred outside Arditti's office took place on February 2 and the dumpster fire on the night of February 6, as the Union and the General Counsel contend, or

whether the dumpster fire occurred first on February 4 and the bush fire on the morning of the election, February 7, as Respondent contends.

The affidavit of Respondent's president, the Hauppauge fire department log, the one report prepared by the Hauppauge fire chief which was not directly put in issue, and the testimony of the General Counsel's witnesses are all consistent on the point that there was a dumpster fire outside Respondent's plant about midnight on February 6. Arditti's affidavit relates that his building manager, Zito, informed him of it on the morning of February 7 and that the police arrived later that morning. His affidavit further states that this was the second fire in 2 days outside Respondent's plant. At the hearing, Arditti and Respondent's vice presidents, D'Agostino and Lipari, testified that the dumpster fire in fact occurred on Sunday night, February 4, and that they learned of this from Zito on Monday, February 5. Zito said he could not remember what day of the week it was he told them of the dumpster fire. I do not credit the testimony of Respondent's officials. I cannot disregard the unequivocal statements in Arditti's affidavits or the clear report of the Hauppauge fire chief as to the occurrence of a dumpster fire on February 6 at Respondent's plant and at other plants in the industrial park in which Respondent's plant is located. It is unlikely that the fire chief would fabricate a report as to those fires because of their extent or that the references to them in the chronological log kept by the fire department was in error.

As to the date on which the bushes in front of Arditti's office took place, I credit Fire Chief Seuling's account that it took place on February 2. The fact that he prepared a report with a fictitious docket number to accommodate Respondent's request for a report of a bush fire on February 7 and his attempt to suggest that the other report he prepared at the General Counsel's request was the original when it was not led me initially to think that his testimony thereon should be rejected *in toto*. I became impressed, however, when his explanations as to how he sought to accommodate Respondent proved out. He impressed me as one who was making a genuine effort to recount accurately the occurrence of the bush fire. When he returned to the hearing room with the original report of the February 2 bush fire which was corroborated by the log entry for that date, he was convincing in his testimony and Respondent's efforts on cross-examination thereon were to no avail.[3] I also note that Arditti's affidavit related that the bush fire occurred before the dumpster fire. Another significant factor is not only what was told Sergeant Peterson by Respondent's officials on February 7 but what was not said to him then. He said he was told then that Respondent was concerned about two fires that occurred outside its plant in the preceding days. What is significant is that there is no testimony that he was expressly told that an arson attempt had occurred but a few hours before he arrived nor was there testimony that he was shown the materials which started that fire. One of Respondent's officials said that that material was retrieved by it and brought to Arditti's office; another said that the fire chief brought it to them. It would seem to me that, had the bush fire occurred that morning as a result of the lighting of production paper used in the plant, Respondent would have turned that evidence over to the police were it conducting an arson investigation of the bush fire and the police would have used the paper to pursue its investigation with the employees in the plant. I reject the testimony of Respondent's officials that the bush fire occurred on the morning of the election. Nor do I credit the denials of D'Agostino and Lipari that they told employees Terry and Ciapetta that Respondent would move if the Union caused another act of violence. In making that credibility resolution, I rely not only on D'Agostino's and Lipari's uncredited accounts as to the fires themselves but also on the testimony of Terry. Respondent examined him at great length and made much of the fact that the affidavit he had given in the administrative investigation made no reference to his being told by the police that they could shoot if they caught someone attempting arson. Sergeant Peterson's testimony, however, corroborated Terry's account thereon.

Based on the foregoing credibility resolutions and the credited evidence, I find that Respondent threatened to move its operations from Hauppauge to discourage its employees from supporting the Union and that it sought out and obtained the assistance of the Suffolk County police to instill firmly in the minds of its employees that Respondent was serious in its effort to discourage unionization. Sergeant Peterson testified that Respondent suggested to him that "the union people" started the fires. The fact that the police may have unwittingly been made participants in that effort does not relieve Respondent of its own involvement.

C. Alleged Threats and Other Alleged Coercive Conduct

The General Counsel alleges in the complaints that James Lohlein, who Respondent admits is a supervisor as defined in the Act, warned employees of the futility of voting for the Union and threatened employees with discharge or other reprisals on January 17 and on other dates in January, February, and March, 1979, to discourage their support for the Union, and warned and directed employees on unknown dates in January to refrain from joining the Union.

Bruce Terry testified for the General Counsel that, on January 13, Lohlein said to him that Respondent would fire him and Ward Ciapetta, that Respondent did not know what it was doing, and that it thinks it would put an end to the union business by firing Terry and Ciapetta. Terry stated that employees Ciapetta, William Paulin, and Donna Lowitt were present when Lohlein made these comments and that no one responded to them. Lohlein denied making any such statements. Neither Ciapetta nor Paulin, both of whom were called as

[3] He was firm as to the exact location of the bush fire on Respondent's premises. I place no weight on the testimony of Respondent's last witness, Dwayne Melli, as to the occurrence of another bush fire during the 1978–79 winter outside the other end of the building, which part is occupied by his employer. He stated that that fire occurred at a place between the location of the first bush fire and the location of the dumpster. Had such a third fire occurred in the week before the election, Respondent would have made much of it in February 1979, and would not have waited to disclose it through its last witness.

witnesses by the General Counsel, offered any evidence respecting such alleged statements. In view of the absence of corroboration by those employees, I find that the General Counsel has failed to sustain the burden of proving by a preponderance of the evidence the alleged threat by Lohlein and I shall dismiss this allegation.

Paulin testified for the General Counsel that Lohlein had said to Terry and Ciapetta many times that there was no way that the Union "would get in here" and that Terry and Ciapetta were wasting their time in supporting the Union. Lohlein denied making any such statement. Neither Terry nor Ciapetta referred in any way during their testimony to those alleged remarks by Lohlein. In the absence of corroboration by them, I find that, here too the General Counsel has not met his burden of proof to persuade me that the version given by Paulin is more credible than Lohlein's denial. I shall dismiss that allegation also.

Evidence was offered that Lohlein and others of Respondent's agents permitted employees opposed to the Union to campaign against the Union during working time but restricted campaigning by employees who supported the Union. That matter is discussed separately below.

D. *Alleged Discriminatory Assignments of Ciapetta to More Onerous, Less Agreeable Work*

Ward Ciapetta began working for Respondent in late 1978 and accompanied Bruce Terry in early January in soliciting employees to sign authorization cards for the Union. In early January he was transferred from the wash line in the Permion Division to the preprocessing area. He informed the supervisor there that he did not like working there. Ciapetta also informed a leadman in the work line area that he would quit. After working in preprocessing but 2 hours, he was transferred back to the wash line. Ciapetta testified that, a few days later, after he and Terry began soliciting for the Union, he was transferred back to the preprimary area. He stated that he told his supervisor there, Pat Parisi, that he did not know that job and did not like it. He said that Parisi responded that, if he did not do the work, he would be fired. Bruce Terry testified that the washline supervisor, Lohlein, told him that he guessed that Ciapetta was transferred to the preprimary area because Respondent wanted him to quit. The record does not disclose how long Ciapetta worked there but he was later returned to the wash line. Respondent's witnesses testified that Ciapetta was transferred to the preprimary area for brief periods in January simply because his services were needed there. They also testified that such transfers were routine then, that the work in preprimary is less onerous than the work in the wash line section as employees in wash line are required to lift heavy drums whereas preprimary employees sit at a film rolling machine for most of the day. The preprimary area is air-conditioned and is cleaner than the wash line section. They conceded that the preprimary area work was more "boring" than the wash line work. One of the General Counsel's witnesses, David Grijalva, testified that he had been assigned occasionally to work in the preprimary area for brief periods. Another of the General Counsel's witnesses stated that newly hired employees (as Ciapetta was at that time) are assigned to work in the preprimary area.

As the work in the preprimary area and the work line section appears to be unskilled, as the preprimary area is cleaner and the work there less onerous than in the work line section, and as there is no substantial evidence of disparate treatment, I find that the evidence is insufficient to establish that the second transfer of Ciapetta to the preprimary area, apparently for a brief period, was discriminatorily motivated. Supervisor Parisi's statement to Ciapetta that he would be fired if he refused to work in the preprimary area is simply a routine warning to an employee who expressed a distaste for the work. Supervisor Lohlein's guess as to why Ciapetta was transferred out of his department seems to be only a normal expression of dismay by a line supervisor who had a good worker, as Ciapetta admittedly is, transferred out of his department.

E. *Alleged Promises and Benefits and Warnings by Respondent's President*

The complaint in Case 29-CA-7110 alleges that Respondent's president, Sol Arditti, promised and granted to its employees, *inter alia*, increased medical health and dental insurance coverage to discourage their support for the Union and warned employees that its customers would cancel contracts with Respondent if they voted for the Union and that it would refuse to bargain with the Union if it won the election.

In support of those allegations, the General Counsel called four witnesses. Bruce Terry testified that he, Ward Ciapetta, Bill Paulin, and about seven other employees attended a meeting on January 30 in the library on Respondent's premises conducted by Respondent's president, Sol Arditti. Terry testified that all that he could recall of that meeting was that Arditti said that the Union was not in the best interests of the employees, that the Union's representative, Al Constantine, did not know anything about the business Respondent was in, that he, Arditti, was aware of some of the employees' problems, that one of the problems was increased medical costs and that he was doing something to alleviate that problem and that prounion employees were harassing "non-union people." Terry stated that he interrupted Arditti to say that the only harassment going on was Respondent's threats to fire employees and that Arditti then denied that any such threats were made.

Ward Ciapetta testified that Arditti told him, Terry, Paulin, and others at that meeting that their medical coverage was being increased and that its customers did not want the Union there and that Respondent would lose contracts if the Union came in. Ciapetta stated that, right after that meeting, Arditti asked to talk to him and told him then that, if the Union wins and makes outrageous demands, Respondent would not have to bargain with the Union.

William Paulin testified that Arditti, at that meeting, talked about benefits coming up—more dental plan coverage and better Blue Cross/Blue Shield coverage. He said that Arditti was then reading from a book. Paulin also testified that he had no knowledge of any dental

plan Respondent had. Paulin testified that, at one point, Terry told Arditti that, when the Union came in, he (Arditti) would have to bargain with it. Paulin said that Arditti responded that he would not bargain with the Union.

David Grijalva was also called by the General Counsel to testify as to a meeting he attended a week before the election with another group of employees, at which Arditti spoke. He said that Arditti asked the employees how they thought management treated them and that he asked a question to which Arditti responded. In particular, he stated he asked Arditti that, if the Union won, whether Arditti would bargain with it and that Arditti said he would not. David Grijalva also testified that Arditti said that Respondent's customers did not like union shops and that they were no good for business.

Respondent's president denied that he promised employees benefits or otherwise sought to coerce them to discourage support for the Union. He testified that, on January 31, Respondent distributed a leaflet to all employees which informed them that no one would lose his job because he joined a union, that, if a union wins, the Company must bargain in good faith, that all present benefits were valid subjects for bargaining, and that a company could reject demands if they were too costly or unreasonable. He further testified that he conducted meetings among six groups of employees in the library prior to the election, all of which followed the same outline. He testified that he began each meeting by noting that Respondent has expanded its business in the previous several years and has promoted from within its own employee complement. He noted that the plant is 100 percent air-conditioned. He discussed the medical plan and its costs and said that Respondent pays in full for it after an employee has been with it for 5 years. He also discussed Respondent's pension plan; he did not mention any increase in a dental plan as Respondent does not have a dental plan. He stated he did not mention the "automatic" increases in Blue Cross/Blue Shield benefits discussed below which became effective July 1, 1979, as he was not aware of them at the time of the meetings. He stated that Ciapetta asked if it was not true that any benefits negotiated by the Union if it won would be added to present benefits. To that, he responded that all benefits could be negotiated. He said that Grijalva asked at one meeting whether or not Respondent would negotiate with the Union and he answered that it would if the majority of employees selected the Union. He denied making any references to customers of Respondent or to its losing contracts if the Union came in.

Arditti's administrative assistant testified that she is responsible for handling all medical-surgical claims and that in early January she received a notice from Blue Cross/Blue Shield of an increase in coverage effective July 1 and, as requested by Blue Cross/Blue Shield, she posted a notice to that effect on the employee bulletin board then. The notice was one that Blue Cross/Blue Shield apparently sent to many other companies at that time. It appears from her testimony that the increased coverage would go into effect unless Respondent notified Blue Cross/Blue Shield to the contrary, as premiums would also be increased. She stated that Respondent took no action and that Arditti simply noted the word "file" on the top of a copy of the letter she had received from the carrier. This increase in coverage went into effect in July.

Arditti's testimony is that he prepared carefully for these meetings. He prepared an outline and had calculated the costs to Respondent of the benefits. I also note his testimony that he has a graduate degree in corporate finance. I find it hard to accept his testimony that he was unaware at the time of the meetings in January of the increased Blue Cross/Blue Shield benefits scheduled to come into effect in July. His administrative assistant was fully aware of them and her testimony was uncontroverted that a notice was posted in January advising everyone of the scheduled benefit increases. I find that he did allude to them as Terry, Ciapetta, and Paulin testified. I also find that it was proper for him to do so as there was no evidence that Respondent's routine acceptance of the "automatic" increase offered by Blue Cross/Blue Shield to its subscribers was motivated by antiunion considerations. I do not credit Paulin's testimony that Arditti promised an increase in dental plan coverage. None of the other employees referred to this and Respondent does not have a dental plan. I suspect Paulin confused the discussion of the pension plan with a dental plan. Nor do I credit Ciapetta's, Paulin's, or Grijalva's accounts that Arditti told them he could not bargain with the Union. Terry testified that he recalled no such comment by Arditti. I think they erroneously interpreted Arditti's statement that the Union can take off present benefits and that Respondent is free to say "No" to the Union's demands as a representation that Respondent would not bargain in good faith. I also do not credit the accounts of Ciapetta and Grijalva that Arditti said that Respondent's customers opposed the Union and would cancel their contracts with it if the Union came in. Terry did not corroborate this, nor did Paulin. I note that Arditti's letter of January 31 referred to Respondent's position that, if there is a strike, everyone suffers including customers. It is unlikely that he would have openly expressed the outright coercive statements which are reflected in the testimony of Grijalva and Ciapetta. I am not saying that they willfully fabricated their testimony but only that the evidence fails to establish that the actual remarks made by Arditti went beyond the scope of Section 8(c) of the Act; their construction of his remarks was erroneous.

I shall dismiss these allegations of the complaint and recommend that the related objections be overruled.

F. *Alleged Disparate Treatment Between Prounion and Antiunion Employees*

The General Counsel and the Union contend that Respondent allowed two employees, Faith Lensky and Richard Romano, free rein in its plant to solicit employees to sign a petition expressing opposition to the Union and otherwise to encourage employees to reject the Union while, at the same time, Respondent restricted Bruce Terry and other employees in their efforts in the plant to obtain support for the Union. Respondent asserts that the work that Lensky and Romano performed re-

quired them to walk about its plant whereas Terry and the other prounion employees were assigned to specific locations. It also asserts that it did not police every discussion but made reasonable efforts to maintain neutrality and production.

Terry testified that there were many occasions during the Union's campaign in January when he observed that Lensky and Romano, who were openly opposed to the Union, were talking to employees for an hour or more. Ciapetta testified to the same effect. Terry also testified that on one occasion he left his work area to remonstrate with Lensky who was then urging employees to sign a petition expressing opposition to the Union and that, while Terry was urging the employees not to sign it, Respondent's production manager, Joseph Santisi, escorted him back to his own work area. Santisi testified at the hearing but did not allude to that incident. In early March, Terry was talking with an employee who had been discharged the previous day. Terry testified that he obtained from that employee his telephone number and wrote it down. At this point, Respondent's vice president, D'Agostino, told the discharged employee to leave and demanded that Terry turn over to him, D'Agostino, the union card that D'Agostino believed that that employee had just given Terry. Terry refused to turn over the paper and he testified that D'Agostino threatened to have him arrested.

D'Agostino testified that he asked Terry for the union card at that time and stated that he told Terry that he does not want anyone "participating in union activities on work time." D'Agostino further testified that Lensky is employed on quality control and that she has occasion during the workday to go to production area to take samples for examination in the quality control section and to pass through that area en route to the office. Richard Romano is a maintenance employee whose duties require him to do repair work throughout the plant.

Respondent's vice president, Lipari, testified that Respondent became aware of the activities of Lensky and Romano when Arditti's administrative assistant handed him and Arditti a letter dated January 22, which was signed by 28 employees and which related that the signers wanted no involvement with the Union. Lipari testified that he and Arditti then were aware of the activities of Romano and Lensky in opposing the Union and that he and Arditti were "aghast" when they read that letter. Romano was one of the employees who signed it. Arditti, however, testified that he was unaware that Romano opposed the Union until the day before the election (February 6) when Romano distributed to employees copies of a two-page letter he alone had signed which urged them to vote "No" in the election. Arditti also testified that he saw the petition, referred to in Lipari's testimony above, about 3 weeks before the election.

The General Counsel offered testimony that Arditti in fact had urged an employee to sign a petition against the Union. Thus, William Paulin testified that about a week before the election he heard Arditti ask an employee, Donna Lowitt, if she had signed a union card. When she told him she had not, Arditti asked her if she wanted to sign a list against the Union. Paulin said that Lowitt did not respond to this. Lowitt's name is one of the 28 names on the January 22 letter, referred to above. Lowitt, who was called by Respondent as a witness, and Arditti denied the alleged interrogation and solicitation.

In view of uncontroverted testimony by Terry that Santisi escorted him back to his work area when he sought to dissuade employees from listening to Lensky's efforts to have them sign a letter stating their opposition to the Union, the attempt by D'Agostino to stop Terry from soliciting for the Union in March, and the contradictory accounts of Lipari and Arditti as to when Respondent first became aware of Romano's antiunion sentiments, I credit the General Counsel's witnesses that Respondent gave free rein to Lensky and Romano throughout the plant to solicit opposition to the Union while, at the same time, it restricted Terry and other union supporters in their efforts to obtain support for the Union. I also credit Paulin's testimony that Arditti urged employee Lowitt to sign a statement "against" the Union. I place no weight on Lowitt's attempt to corroborate Arditti's denial as she gave confused testimony respecting the authorization cards she had signed for the Union and/or other relevant matters. In that regard, she was unclear as to when she signed cards for the Union or whether she in fact wrote the date on one of them. She also testified that no one from management had ever campaigned against the Union and that, while she attended a meeting of employees before the election, she said she thought someone from the Company spoke at it but did not recall who he was or what was said.

G. *The Alleged Discriminatory Discharge of Bruce Terry*

The essential facts are not in material dispute. Terry, as noted above, was the most active of Respondent's employees for the Union, had been identified by Respondent to the Suffolk County police as one of four key union supporters, and had served as the Union's observer at the election. Terry testified that, on January 22, Respondent's vice president, D'Agostino, told him he had at one time thought of firing Terry because he was often late but did not do so because Terry was a good worker. Terry said that, shortly after this, D'Agostino told him that if he was late once more he would be fired. D'Agostino testified that he reviewed Terry's attendance record in connection with a complaint by an employee to the effect that she had not gotten a raise when others with poor attendance records did. (Terry had received a $10 increase in early January before he resumed soliciting cards for the Union.) D'Agostino testified that, when he reviewed Terry's attendance record, he told him that, if he were Terry's supervisor, he would fire him. Terry's appraisal form indicated that he was a good worker; Terry wrote on it that he was then (December 1978) quitting his second full-time job so that he would be able to report on time for work with Respondent.

Terry testified further that, in early March after the Union lost the election, he again solicited cards for the Union. On one of these occasions, he said that Respondent's production manager, Santisi, observed him handing

a union card to an employee and that Santisi "turned white." Respondent terminated another employee, Joseph Taffner, on March 7. Taffner came back to the plant later that day or the next and talked briefly with Terry, during which, according to Terry's testimony, he jotted down Taffner's telephone number. It was that discussion which led to the incident discussed above when Respondent's vice president accused Terry of having obtained a signed union card from Taffner and demanded that Terry give it to him. About noon on February 8, Terry printed a handwritten sign and placed it on the inside of the windshield of his car which was in the parking lot alongside Respondent's building. The sign read, "Please don't feed management. They only suck blood." Respondent placed in evidence a record of an unemployment compensation hearing. That record discloses that Terry asserted that he put that sign in his car to protest Taffner's discharge and to protest the harassment by Respondent of his, Terry's, attempts to bring the Union into Respondent's plant. (Terry's affidavits received in evidence are to the same effect.) Terry was denied unemployment benefits based on a finding that the language he used on the sign constituted just cause for discharge.

Respondent's officials testified that Arditti decided on February 8 to discharge Terry because of the language on the sign and, after discussions with its counsel, determined to let Terry go at the end of his shift on the next day, Friday, March 9.

Arditti prepared a sheet listing reasons for terminating Terry, to be used by him when he talked to Terry. On it are listed the following eight numbered reasons for terminating him: (1) sign in company parking area; (2) attendance and lateness; (3) insubordination to management; (4) disruptive to plant operation; (5) union activities during production time—including activities after election; (6) ethnic comments to Parisi; (7) suspicion of deliberately damaging equipment to stop production; and (8) after being advised of lateness and absenteeism, continued same behavior.

Terry testified that Arditti, with D'Agostino present, called him to the library at 4:30 p.m. on March 9 and that Arditti said he was firing him because of his lateness and the sign in the windshield. He also said that Arditti told him he had six other reasons for firing him. Terry was given his check and he left.

D'Agostino testified that he told Terry at that interview that he was being terminated for cause because he placed in the windshield of his car in the parking lot the sign which was detrimental to the Company and that it was totally disloyal and totally defiant. Arditti testified that he and D'Agostino indicated to Terry that Terry has demonstrated a total lack of regard for other people's interests and rights.

Respondent adduced a great deal of testimony as to acts of sabotage in the plant. Its officials testified that Terry was suspected by them of having committed these acts.

Respondent also offered testimony that Terry, in October 1978, had called one of its supervisors, Pat Parisi, a "guinea" on a number of occasions. Terry denied that he ever made such ethnic slurs. Arditti said he learned of the slurs, for the first time, during the early part of the week in which Terry was discharged. Parisi testified that he mentioned these incidents to "upper management" but does not remember the circumstances and that he did so for no special reason.

There was also testimony that Respondent's maintenance manager, Zito, had a verbal altercation with Terry early in March about Terry's desire to keep a door to the outside ajar to let fresh air in.

Arditti testified ultimately that he would have discharged Terry because of the sign alone and would not have discharged him if he had not displayed the sign.

The General Counsel contends that the shifting reasons advanced by Respondent for discharging Terry demonstrate that Terry was discharged because he had resumed his campaign to have employees sign cards for the Union, and that Respondent seized upon the language of the sign as a pretext to conceal that reason. The General Counsel argues that, in any event, the sign was part of Terry's protected activities for the Union and that, even were Arditti credited as to his motive, the violation is established. Respondent asserts that the language on the sign was not protected by the Union.

It is obvious that almost all of the reasons listed by Arditti for having discharged Terry were camouflage. His own testimony establishes this. To cite as a reason an ethnic slur allegedly made over 4 months previously and which mysteriously came to Arditti's attention just before Terry's discharge strains credulity. I reject Parisi's testimony thereon in its entirety. He said that Terry ceased making ethnic remarks in October 1978 when he, Parisi, could no longer take them and that he had to grab Terry by the throat to make him stop. He explained that he made no disclosure thereon then because, as a supervisor, he wanted to handle the matter in his own way. Nevertheless, he stated that in some manner he cannot recall he disclosed this to Arditti in March. I do not credit any of his account.

Arditti could not have seriously viewed Terry's attendance record as a reason for his discharge as Terry himself in December 1978 voluntarily gave up a second job to get to work on time and as Arditti testified about he, himself, never gets involved in discharging employees for such reasons but defers to the production manager for such decisions. As to the alleged suspicions Respondent had that Terry was engaged in sabotage, suffice it to note that the reason is itself suspect and that Arditti obviously abandoned it in his talk with Terry on March 9. The minor altercation involving Terry's insistence that fresh air be allowed in the plant could not sustain his discharge for cause as it appears that Terry had received permission from his supervisor to keep the door open. The other reasons Arditti listed involved the language of the sign, Terry's union activities and apparently related insubordination (presumably this refers to the refusal to Terry to comply with D'Agostino's request to surrender Taffner's "union card" on March 7 or 8), and "disruption of plant operation" (unless that pertained to the alleged acts of sabotage discussed earlier).

It is difficult to understand on what basis the General Counsel has urged that the wording on the sign was a

pretext. The event happened. It happened the day before Terry was discharged. Respondent was clearly upset by it then as it took photographs of the sign. The words on the sign were hardly designed to endear Terry to Respondent.

Based on Arditti's list of reasons which shows that Terry's union activities were one of the reasons for his discharge, the pretextual nature of other listed reasons as discussed above, the evidence of disparate treatment found above as to Terry's attempts to solicit authorization cards, the concerns expressed verbally by D'Agostino, the conduct of Santisi when Terry resumed the organizational campaign in early March, and the overall evidence of union animus, I find that Terry's discharge was due to the fact that he had resumed his organizational efforts for the Union. Under established Board policy, that finding alone establishes a violation of Section 8(a)(1) and (3) of the Act.

The General Counsel now urges that I should also find that the sign Terry displayed was also protected and that his discharge in part therefor constituted a further basis for the violation. Respondent contends that I should find that Terry's use of the sign was an activity unprotected by the Act and that it was the primary reason for his discharge. As the Board has not adopted this mixed motive approach (assuming that the sign was unprotected), I must reject that contention.[4] Nevertheless, I shall now consider the General Counsel's alternate contention that Terry's use of the sign constituted a protected activity.

In evaluating whether an "outburst" by an employee is protected by the Act, the Board takes into account the place, the subject matter, the nature of the outburst, and whether it was provoked in any way by an Employer's unfair labor practices.[5] An appeal to the public to boycott an employer is not protected.[6] Appeals to coworkers to "sit out" or to engage in a "sick-out" may not be.[7] Unprovoked remarks that were obscene and offensive are unprotected.[8] On the other hand, the "most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.[9] Federal law gives a union license to use intemperate, abusive, or insulting language without fear of restraint or penalty where it believes such rhetoric to be an effective means to make its point.[10] These last two principles were quoted in a decision adopted by the Board recently.[11] Language, however, which is sufficiently opprobious, profane, defamatory, or malicious, is not protected.[12]

Respondent does not concede that Terry's use of the sign was in furtherance of his union activities but contends that it was an isolated defamatory statement expressive of solely his own personal hostility and made in furtherance of his own ego. I disagree. The circumstances clearly indicate the contrary. He had just been, in effect, threatened with arrest by one of Respondent's vice presidents for not surrendering a "union card" which the vice president believed had just been signed. A coworker had just been discharged. Terry's campaign to obtain more union cards was faltering. Respondent as found above had committed a series of unlawful acts which had interfered with the Union's election campaign. Respondent, in its own campaign literature, had made much of its view that the Union's officials were interested only in their personal gain and the Union was engaged in a fraud by expressing a wish to represent the interests of Respondent's employees. In these circumstances, the language used by Terry seems clearly aimed at shaking his coworkers out of what he conceived to be their lethargy in passively accepting Respondent's acts. It was his "graphic way of attempting to arouse his fellow workers"[13] and was not morally repugnant or so personally offensive as to render it unprotected. I thus find that Terry's use of the sign was protected by the Act.[14] His discharge therefor violated Section 8(a)(1) and (3).

H. *The Request for a Bargaining Order as a Remedy*

The General Counsel contends that the unfair labor practices committed by Respondent had the tendency to undermine the Union's majority strength and to impede the election processes. He submits that, as the possibility of erasing the effects of these violations by the use of the Board's traditional remedies and as the Union on March 22 had a majority, the issuance of a bargaining order is an appropriate remedy. The General Counsel disclaims seeking a bargaining order if it is found that the Union did not possess a majority on March 22 as this case is not one marked by outrageous and pervasive unfair labor practices.

The first issue to be considered is whether the Union possessed a majority of authorization cards on March 22. The General Counsel placed in evidence an excerpt from Respondent's payroll records which showed that it had 57 production and maintenance employees on its payroll roster on March 22. The General Counsel would add

[4] In its brief, Respondent cites *N.L.R.B.* v. *Eastern Smelting and Refining Corporation*, 598 F.2d 666 (1st Cir. 1979), in urging me to follow the First Circuit's guidelines. In fn. 8 of its opinion, that court found it inexplicable that the administrative law judge in that case had continued to follow Board precedent. The case law is clear that Board precedent is binding on me unless and until the United States Supreme Court rules otherwise. I have no authority and no inclination to disregard the Board's holdings.

[5] *Atlantic Steel Company*, 245 NLRB 814 (1979).

[6] *N.L.R.B.* v. *Local Union No. 1229, International Brotherhood of Electrical Workers, AFL-CIO [Jefferson Standard Broadcasting Company]*, 346 U.S. 464 (1953).

[7] *United States Postal Service*, 241 NLRB 524 (1979), where the Board adopted *pro forma* the findings by the Administrative Law Judge in the absence of exceptions.

[8] *Southwestern Bell Telephone Company*, 200 NLRB 667 (1972).

[9] *Linn* v. *United Plant Guard Workers of America, Local 114*, 383 U.S. 53, 63 (1966).

[10] *Old Dominion Branch No. 469, National Association of Letter Carriers, AFL-CIO* v. *Austin*, 418 U.S. 264, 273 (1974).

[11] *United States Postal Service*, 241 NLRB 389 (1979).

[12] *American Hospital Association*, 230 NLRB 54 (1977).

[13] *Pincus Brothers Inc.—Maxwell*, 237 NLRB 1063 (1978).

[14] At the hearing, Respondent cited the decision in *Liberty Mutual Insurance Company* v. *N.L.R.B.*, 592 F.2d 595 (1st Cir. 1979), as favorable to its view. That case is factually distinguishable. The concurring opinion there observed that "the Board seems unable to recognize that as a matter of business judgment there can be only one course open to management when an employee persists in giving it the finger." The court there was characterizing activities not protected by the Act and not evaluating whether an "outburst" was protected or not. If anything the concurring opinion implicitly recognizes that colorful language is often used for effect.

Terry's name to that list, raising the total to 58. Of those 58 employees, 30 signed authorization cards for the Union.

Respondent contends that one of the employees on that list and who had signed a card, Richard Cuffari, had abandoned his employment with Respondent by March 22. It also asserts that another card signer on that list, David Grijalva, was a supervisor. It further contends that four other production and maintenance employees (Barbara Maier, Roger Mion, Matthew Moir, and Jack Kimmelman) should be added to that list. It asserts in essence that, on March 22, there were 59 production and maintenance employees in its employ, of which only 27 signed union cards. The adding of Terry's name and inclusion of his card would still not make a majority as then there would be 60 employees, of which 28 signed cards, less than a majority.

As I have found that Terry had been discriminatorily discharged on March 9, I shall add his name to the list and count his card. The unit placement of Richard Cuffari, David Grijalva, Barbara Maier, Jack Kimmelman, Roger Mion, and Matthew Moir as of March 22 is now considered.

Richard Cuffari: began work for Respondent in 1976. He signed a union card on January 10 given him by Terry. On February 14, as his father testified, he had become very emotionally disturbed and was in a severe state of shock. He left the plant that day apparently without notifying anyone as to whether he would return. On March 11, he signed another card for the Union. That one was given him by Terry when Terry visited him at his home. He has been receiving medication and other treatment for his condition. At one point, when the cost of treatment at a mental hospital was proving to be prohibitive, Cuffari's father visited Respondent's president and explained his plight which included the fact that Cuffari's father was also out of work. Respondent's president then gave Cuffari vacation pay for all of 1979 although it had not accrued. Cuffari has never returned to the plant and as of the date of the hearing was considering learning a trade when and if his condition permits. His testimony indicates that the pressures of work at Respondent's plant tend to disturb him. Cuffari's name appears on a list of unit employees as of March 22 which was prepared by Respondent during the prehearing investigation. Alongside his name, there is noted the phrase "sick leave."

From the foregoing, I find that when Cuffari left the employ of Respondent on February 14 without notice to anyone, he abandoned his employment with it. He has no intention now or in the foreseeable future of returning to work for it. I will therefore exclude him from the unit as of March 22 and, of course, not count towards the Union's status either of the cards he signed.

David Grijalva: Respondent would exclude David Grijalva as a supervisor as defined in the Act notwithstanding that it had identified him to the Suffolk police on February 7 as discussed above as one of the four employees who led the Union's organizing drive and notwithstanding that his name was included as an eligible employee on the *Excelsior* list for the purposes of the election and also on its March 22 list of unit employees. The General Counsel would include him and count the card he signed for the Union.

David Grijalva had been employed by Respondent for 2-1/2 years as of late 1978. He worked principally in the Permion Division. At the end of 1978 he was promoted to leadman in that division. It was his job then, as he testified, to see that production work was done properly by the employees there. He further testified that, as leadman, he spent about 35 percent of his working time doing production work and the remainder supervising the approximately 25 to 30 employees there. His duties included helping other employees in that division who perform unskilled work. His supervisor, James Lohlein, was on duty at the same time. Respondent's production manager, Joseph Santisi, spent about 80 percent of his time in that department. Grijalva stated that he assigned work to employees based upon his judgment as to how well they performed. He followed the work schedules prepared by Lohlein. On two occasions he talked to employees and told them that, if they did not do better work, his supervisor would have "to take drastic" measures. Shortly after he became leadman, he volunteered to prepare written appraisals of the employees in the Permion Division. Lohlein used these appraisals in reviewing with each of the employees their respective performances. At that time, there were two other employees in the Permion Division classified as leadmen, Bruce Terry and Grijalva's brother, Fred David Grijalva earned $160 a week as leadman, about $20 to $30 a week more than the other employees there. All punched the timeclock, including Supervisor Lohlein.

Based on the foregoing, I find that David Grijalva in assisting in the direction of the work of the Permion employees follows routines established by work schedules prepared by Supervisor Lohlein and that he does not exercise independent judgment therein as contemplated by Section 2(11) of the Act. I shall therefore include him in the unit involved herein.

Barbara Maier: The General Counsel and the Union would exclude her as a supervisor; Respondent contends she is a unit employee.

Maier began working in late 1976 as a production employee and was transferred in October 1977 to the quality control unit as a technician. She has a college degree. In December 1977, she was promoted to the position of assistant quality control manager. Respondent's personnel records state that this involved a "change in assignment and responsibility." In mid-1978 she was promoted to quality control manager. In that capacity, she assigns work to the approximately six employees in her department and reports to Dr. Lee who is also responsible for research and development work. Respondent's vice president, D'Agostino, testified that she spends about 5 percent of his working time directing the employees in her department and that this, in his opinion, does not require the use of independent judgment. She has a desk in the quality control area. A second desk there is used by the technicians to write their reports. As of March 22, she earned $165 a week; the other employees in quality control received $130 a week. Her name had been omit-

ted by Respondent from the *Excelsior* list and the March 22 list of employees.

It is axiomatic that a title alone does not establish supervisory status and that a pay differential is only a secondary factor which may help demonstrate, but not by itself sustain, a finding of supervisory status. The uncontraverted testimony indicates that the quality control employees perform routine tasks and that Maier's assignments of work to them does not require the use of independent judgment. I find that there is no probative evidence that Maier possesses any of the supervisory indicia set out in Section 2(11) of the Act. Accordingly, I will include her in the unit involved herein.

Jack Kimmelman: Respondent would include Kimmelman in the unit involved herein whereas the General Counsel and the Union would exclude him as a supervisor. As of March 22, he was foreman of Respondent's shipping department and had two employees under him to whom he made work assignments. Respondent's vice president, D'Agostino, estimated that Kimmelman has spent only about 5 percent of his working time directing employees and the balance in cutting film for customers and processing invoices. Kimmelman earned $170 a week as of March; the other employees in shipping earned $120–$135 a week. Charles Stallone, one of the employees working under him, testified without contradiction that a friend of his, Matthew Moir (whose unit placement is discussed separately below), informed him in late February that there was a job opening in Respondent's shipping department and that Moir introduced him then to Kimmelman. Stallone testified that only Kimmelman interviewed him, gave him an application to fill out, and told him he was hired. Stallone started work immediately. Kimmelman's name was not on the *Excelsior* list Respondent prepared in Case 29–RC–4446 nor was it on the March 22 list of unit employees it prepared. Stallone further testified that Kimmelman gave him his work assignments and on one occasion Kimmelman gave him permission to leave work early for personal business, that he received a raise after Kimmelman told him he was recommending him, Stallone, for an increase.

Based upon the foregoing, I find that Kimmelman, in the interest of Respondent, possesses the authority to hire employees, to effectively recommend wage increases, and to responsibly direct employees in the performance of their work. He is thus a supervisor as defined in Section 2(11) of the Act. I shall therefore exclude him from the unit involved herein.

Roger Mion: The General Counsel and the Union, contrary to Respondent's position, would exclude Mion as a supervisor.

Mion was Respondent's corporate engineering supervisor as of March and worked under Respondent's vice president for engineering, Lipari, and also under the manager of that section and a related section, James Mehall. Mion assigned work on small jobs in his section to two employees. Mion's work and that of those two employees pertained to the maintenance of the production equipment. Mion was a highly skilled mechanic who was responsible for making emergency and difficult repairs. On those occasions, he had the authority to take one of these two employees off routine maintenance jobs to assist him. When the emergency repair work was completed, Mion reassigned his helper to the routine maintenance work. Mion had prepared the schedule for preventive maintenance that they followed.

Mion's salary was $300 a week. One of his assistants received $250 a week; the other earned $200 a week. Mion did not punch a timecard. No evidence was offered to show that his assistants did. Mion's name was not on the *Excelsior* list or on the March 22 list prepared by Respondent.

The foregoing evidence establishes that Mion performed the duties of highly skilled maintenance machinist and that he functioned at a level analogous to a journeyman. The two employees who worked in his section performed standardized maintenance and duties and occasionally assisted Mion when he called upon them to do so. The General Counsel at best has shown that Mion performed leadman's work but he has not established that Mion possessed any of the supervisory indicia set out in Section 2(11) of the Act. Accordingly, I find that Mion was not a supervisor on March 22 and shall include him in the unit involved herein.

Matthew Moir: Respondent would include Moir in the unit involved herein whereas the General Counsel and the Union would exclude him as a supervisor.

Respondent's vice president, D'Agostino, testified that Moir headed up the solvent room operations and directed the seven employees who worked there in unwinding operations, making solutions, and pulling vacuums. It appears that this work is relatively unskilled. Moir received his orders from D'Agostino and from Respondent's production manager, Santisi, and, based on those orders, he gave the work assignments to the employees in the solvent room. D'Agostino testified that Moir spent 10 percent of his working time in directing these employees and the balance in performing unit work. Moir earned $170 a week as of March; the other employees received about $10 a week over the Federal minimum wage rate.

The General Counsel called as a witness David McConnell who had been employed by Respondent from February to September. He testified without contradiction that he learned from a friend that Respondent needed someone to work and, when he applied, he was interviewed only by Moir who gave him an application which he filled out; he was hired by Moir immediately. He testified that Moir gave him his work assignments and, on one occasion, Moir gave him permission to leave work early and that Moir did this without consulting anyone.

Respondent omitted Moir's name from the *Excelsior* list of unit employees and also from the March 22 list.

Based upon the foregoing, I find that Moir, in the interest of Respondent, possesses the authority to hire employees and responsibly to direct the work of the solvent room employees. He is thus a supervisor as defined in Section 2(11) of the Act and I shall therefore exclude him from the unit involved herein.

I. *The Issuance of Majority Status*

The General Counsel introduced evidence that Respondent had 57 unit employees on its payroll on March

22. One of these, Richard Cuffari, as found above, had abandoned his employment on or about February 14 and was not on "sick leave" as of March 22. That finding thus reduces the size of the unit to 56. As I have found, however, that Terry was discriminatorily discharged, his name should be included. Thus the number is restored to 57; David Grijalva's name is on that list and, as he is not a supervisor, it will remain. Thus the number is still 57. The additions of the names of Roger Mion and Barbara Maier raise the number to 59.[15]

J. *Issue of Majority Status*

Cards signed by 32 employees of Respondent were received in evidence. One of these employees was Richard Cuffari. As I have found that he was not in Respondent's employ as of March 22, his card shall not be counted. Another individual, Mark Caesar, had signed a card for the Union. He last worked for Respondent in January. His card also will not be counted. The remaining 30 cards include those signed by David Grijalva and Bruce Terry who have been included in the unit of 59 employees as of March 22.

Respondent asserts that as 6 of the remaining 30 card signers had signed a letter dated January 22 which stated that they "want no involvement with the union movement," the cards they signed should not be counted towards the Union's majority status. I find no merit to that contention as I have found that that letter was the product of the disparate treatment accorded by Respondent to employees Lensky and Romano *vis-a-vis* the treatment shown Terry and as Respondent's president had solicited Donna Lowitt (one of the six card signers who signed that January 22 letter) to indicate that she was opposed to the Union.

Respondent separately asserts that only the cards signed in March should be counted as all the others were signed in a different organizing campaign which antedated the election. Thus, it would not count the cards signed in January by employees Alan Cummins, Michael Finn, Sandra Leventis, Maureen Klein, and Eileen Logan as no evidence was offered that they signed new cards in March, as most of the other card signers did. To so find would, in effect, reward Respondent for its acts which interfered with the Union's effort to have a fair election held.

Respondent further contends that there were cards dated in January which were actually cards signed in late 1978 but which were not destroyed then, as Terry testified, but were fraudulently retained by him and dated afterwards. That contention is based on pure speculation. I find that the January cards were properly authenticated and received in evidence.

Respondent would also reject a number of the cards as the employees who signed them did not personally authenticate them or because they were not completely filled out or because it regards the dates thereon as suspicions. I am satisfied that the proper foundation had been laid for the receipt of these cards in evidence.[16]

Based upon the foregoing, I conclude that, on March 22, the Union had obtained 30 valid cards in the unit of 59 employees, a majority.

K. *Whether a Bargaining Order Remedy Is Appropriate*

The findings above establish that, on March 22, the Union had obtained signed authorization cards from a majority of the unit employees and that Respondent had interrogated employees as to their activities and support for the Union, aided antiunion employees in soliciting opposition to the Union's organizing efforts, threatened to close its Hauppauge plant and to move its operations if the Union caused one more act of violence (shortly before it enlisted the Suffolk County police to harass the four employees who supported the Union's organizing effort), threatened to call the police if Terry persisted in refusing to surrender a "Union card" it believed he obtained from a discharged employee, and discharged Terry because he engaged in activities on behalf of the Union.

The General Counsel has conceded that Respondent's acts do not constitute this case as an "exceptional" one marked by "outrageous" and "pervasive" unfair labor practices which may warrant the imposition of a bargaining order without inquiring into majority status.[17] He does urge that the unfair labor practices by Respondent were pervasive and had the tendency to undermine the Union's majority strength and, as there is a showing that at one point the Union had a majority, the issuance of a remedy is appropriate.[18] Respondent's threat to close its plant and move its operations elsewhere seriously impacted on the conduct of the election.[19] Its discharge of Terry, the leading Union adherent, at a time when the Union reactivated its campaign, underscored Respondent's efforts to coerce its employees to reject the Union.[20] In view of the foregoing and the overall conduct of Respondent, I find that the possibility of erasing the effects of its unfair labor practices and of ensuring a fair rerun election is slight and that the rights of its employees to select the Union as their collective-bargaining representative are, on balance, better protected by a bargaining order. Accordingly, I shall recommend its issuance.

CONCLUSIONS OF LAW

1. Respondent violated Section 8(a)(1) of the Act by interrogating its employees as to whether they supported

[15] As noted in Respondent's brief, the parties stipulated that James Lohlein, Pat Parisi, Joseph Lee, Bruce Stark, and Ed Zito possess supervisory authority as set out in Sec. 2(11) and should be excluded from the unit. The parties further agreed to exclude Carl Perini as a professional employee as defined in Sec. 2(12) of the Act.

[16] Respondent also would reject the card signed by James Flanagan as his testimony at one point indicates that he signed it on the morning of March 13 and as he did not actually start work for Respondent until that afternoon. I accept Flanagan's testimony that he signed the card during the first break after he began work with Respondent. The job application he filled out discloses that dates he uses on documents are not reliable. He dated the application March 14, and indicated on it that he was available to start on March 13.

[17] See *N.L.R.B.* v. *Gissel Packing Co., Inc.*, 395 U.S. 575, 613 (1969).

[18] *Id.* at 614–615.

[19] *Jim Baker Trucking Company*, 241 NLRB 121 (1979).

[20] *Twilight Haven, Incorporated*, 235 NLRB 1337 (1978).

the Union, by threatening to close its Hauppauge plant and move its operations elsewhere to discourage their support for the Union, by permitting employees opposed to the Union to solicit support for their views among its employees during working time while also restricting employees who supported the Union from encouraging their coworkers to join or assist the Union, by threatening employees with arrest to discourage the solicitation of cards for the Union, by threatening to discharge employees to discourage support for the Union, and by discharging its employee Bruce Terry because he engaged in activities protected by Section 7 of the Act.

2. Respondent violated Section 8(a)(3) of the Act by discharging its employee Bruce Terry because of his activities on behalf of the Union.

3. Respondent did not violate Section 8(a)(1) and (3) by transferring its employee, Ward Ciapetta, to its solvent area for a brief period in January 1979.

4. Respondent did not promise to grant additional dental insurance benefits; did not, by its supervisor, Lohlein, threaten its employees with discharge or other reprisals to discourage them from joining or assisting the Union; and did not, by its president, inform its employees that Respondent would not bargain with the Union or unlawfully promise them dental benefits.

5. It is appropriate to remedy the unfair labor practices of Respondent, in the overall circumstances of this case, to require Respondent to recognize and to bargain collectively with the Union as the exclusive bargaining representative of the employees in the unit involved herein.

THE OBJECTIONS

Based upon the findings made above, I conclude that Objections 6, 7, 9, and 12 should be sustained and that the results of the election should be set aside. I further conclude, based on the foregoing findings, that Objections 3, 5, and 10 should be overruled.

In view of my having recommended that a bargaining order remedy should issue, I also conclude that no question concerning representation exists as to the unit of employees involved herein and, accordingly, I recommend that the petition in Case 29-RC-4446 should be dismissed.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices proscribed by the Act, I recommend that it be required to cease and desist from such conduct and to take the affirmative action set out below.

Bruce Terry shall be offered full reinstatement by Respondent with backpay computed on a quarterly basis with interest thereon in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962), and *Florida Steel Corporation*, 231 NLRB 651 (1977), from March 9, 1979, until he is offered reinstatement. Respondent shall recognize and bargain collectively with the Union as the exclusive representative of Respondent's production and maintenance employees.

[Recommended Order omitted from publication.]

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

JAMES F. MORTON, Administrative Law Judge: The record in this case was reopened by an order issued on November 21, 1980, by direction of the Board "for the limited purpose of allowing Respondent to cross-examine witness Bruce Terry with respect to his direct testimony regarding Respondent's alleged unfair labor practices . . . [but not] with respect to the authorization cards he solicited." The supplemental hearing was held on January 20, 1981. Thereafter, Respondent filed its supplemental brief in which it stated that it does not believe that its having been given the opportunity, after my original Decision in this case[1] had issued, "cures or compensates for what [Respondent] continues to assert was an improper and prejudicial denial by [me] of the opportunity to cross-examine Terry at the end of his direct examination." Respondent stated later in its supplemental brief that it nevertheless has confidence in the Board's decisional processes. Those two statements appear to be in conflict. In any event, I construe them as, in effect, a motion that I disqualify myself[2] and I shall deny it for the reasons detailed below.

Upon the entire record, including my observation of the demeanor of the witnesses and after due consideration of the brief filed by Respondent and of its supplemental brief as well as the brief filed by the General Counsel after the close of the reopened hearing, I make the following:

FINDINGS OF FACT

THE ALLEGED UNFAIR LABOR PRACTICES

A. *The Allegations as Previously Litigated*

In the complaint that issued in this case, the General Counsel had alleged that Respondent on eight separate occasions had violated Section 8(a)(1) or (3) of the Act.

One of those allegations was that Respondent by its supervisor, James Lohlein, threatened employees with discharge to discourage their support for the Union. In my initial Decision, Lohlein's denial was credited over Terry's testimony thereon since two individuals who Terry testified were present at the time of the alleged threat did not corroborate Terry although they also testified on behalf of the General Counsel. The General Counsel did not file an exception to my dismissal of this allegation and, of course, Respondent did not cross-examine Terry thereon at the resumed hearing on January 20, 1981.

The second complaint allegation was that Respondent's president, Arditti, unlawfully promised benefits to employees at a meeting on January 30, 1979. That allega-

[1] JD-(NY)-37-80, dated July 7, 1980.

[2] The only other possible inference that I grasp is the implication that the complaint must be dismissed as a matter of law in view of the asserted prejudicial error. I do not think Respondent would press that contention since such a holding would deprive the General Counsel and the Charging Party of their respective rights to a determination of the merits in this case.

tion was also dismissed as Terry's testimony thereon supported the account of Respondent's president and not those of other witnesses who testified for the General Counsel respecting that meeting. Here, too, no exception to my Decision was filed and Respondent did not cross-examine Terry thereon.

A third allegation which I had dismissed involved alleged discriminatory work assignments to employee Ward Ciapetta. Terry had not offered any material evidence thereon in his direct examination. Respondent obviously did not reopen that matter in its cross-examination of Terry at the resumed hearing.

I found that a violation of the Act had occurred as to the fourth allegation that Respondent's president asked an employee if she signed a union card and urged that employee to sign an antiunion petition. That finding was based on the testimony of William Paulin. Terry was not involved in that incident.

A fifth allegation in the complaint was that Respondent restricted Terry and other employees who supported the Union from soliciting for the Union in work areas while Respondent allowed antiunion employees to campaign against the Union in those same areas. The relevant testimony Terry offered on that allegation was uncontroverted by Respondent's witnesses (e.g., Terry testified without contradiction that Respondent's production manager, Santisi, escorted him back to his work area when he, Terry, sought to dissuade employees from listening to one of the employees who was trying to secure signatures on a letter which stated that the employees did not want the Union). Also, Terry had testified that one of Respondent's vice presidents, D'Agostino, had told him that he could not solicit cards for the Union while working and D'Agostino's own testimony confirms that he did make that effort to stop Terry. The other evidence bearing on that allegation, as set out in my original Decision, involves the accounts of other witnesses.

The sixth allegation pertained to threats made to Terry and others on the day of the election, February 7, 1979. Terry's account as to the interview in the library by a police officer was substantially corroborated by the sergeant, who testified for Respondent respecting the "bush burning" incident. My findings respecting the allegation that Respondent had threatened employees Terry and Ciapetta that it would move its plant if the Union caused another act of violence were predicated for the great part on the events surrounding that bush burning affair. I also specifically credited Terry. In doing so, I stated that Respondent had examined him at great length. Obviously that statement did not refer to any cross-examination thereon but to the impression that no material differences were shown in collateral areas of his testimony despite Respondent's vigorous efforts to shake that testimony. In crediting Terry's account thereon I also noted that he had testified on direct examination that the police officer had stated that the police could shoot anyone caught in an arson attempt, that Respondent sought to discredit Terry on the ground that his pretrial affidavit did not mention such a statement by the police, and that the police sergeant who testified for Respondent confirmed that he had made such a statement.

The last complaint allegation involved the discharge of Terry. I had noted in my initial Decision that the essential facts thereon were not in material dispute.

B. *The Scope of the Board's Remand*

At the original hearing, Terry had testified respecting certain of the alleged unfair labor practices as discussed above and also with respect to practically all of the Union's authorization cards which were proffered by the General Counsel to establish the Union's majority status. During the course of Terry's direct examination by the General Counsel, Respondent was allowed extensive *voir dire* on most of the signed cards Terry had solicited. At the conclusion of Terry's direct examination, Respondent undertook to question Terry respecting the circumstances under which each of those cards was obtained. The General Counsel's objections at various points to Respondent's questions as improper or dilatory in nature were overruled but Respondent was advised by me that it should plan on concluding its cross-examination no later than noon on the following day. Respondent continued to cross-examine Terry on the authorization cards. At one point the General Counsel objected to certain aspects of Respondent's cross-examination as irrelevant and the General Counsel noted that Respondent had not even touched upon the alleged unfair labor practices despite the length of the cross-examination as of that point. At a sidebar conference on the record, Respondent's counsel indicated that, based on his expertise, he would be able to demonstrate in further cross-examination that the authorization cards were signed by employees based upon misrepresentations made to them. When he indicated he had no specific evidence thereon, I advised him that I would give him the leeway he sought to explore the matter with Terry but I also advised him that he should expect to conclude his overall cross-examination by 1 p.m. When that time arrived, I allowed Respondent to continue but at 1:20 p.m. I advised Respondent that I would adhere to my ruling and thus I ended the cross-examination of Terry. As of that point, Respondent had not asked Terry any questions regarding the alleged unfair labor practices referred to in his direct examination.

The original hearing concluded in 10 days and my Decision, as noted above, issued on July 7, 1980. By order dated November 21, 1980, the Board reopened the record and remanded the proceeding before me for the limited purposes of allowing Respondent time to cross-examine Terry with respect to his direct testimony on Respondent's alleged unfair labor practices. The Board's order stated that Respondent shall not be permitted to cross-examine further Terry with respect to the authorization cards which he solicited.

C. *The Resumed Hearing*

When the hearing resumed on January 20, 1981, Respondent urged that it should be permitted to cross-examine Terry as to the authorization cards he solicited, notwithstanding the provisions of the Board's order. Respondent indicated that such questioning was necessary as certain of the alleged unfair labor practices were

closely connected with incidents in which cards were signed. I advised Respondent that cross-examination on authorization cards which is necessarily incidental to events surrounding the alleged unfair labor practices would be permitted but that direct attacks on the authenticity of the cards were precluded by the Board's order.

During his cross-examination at the resumed hearing Terry was asked about the events that occurred in the week preceding his discharge on March 9, 1979, including his knowledge respecting three authorization cards signed by employee Joseph Taffner and particularly about the dates thereon. The first point of argument presented by Respondent in its supplemental brief is that, in its view, a comparison of those cards with other cards received in evidence discloses that Terry dated Taffner's cards and other cards. Respondent urges that those cards "are the litmus test of Terry's credibility generally." I have examined the way the March 5, 1979, date is written on Taffner's card and note that it is written in the same color ink and in the same general style and impression as appears in his signature. I have also compared that date with dates written on Taffner's authorization card dated January 10, 1979. It all appears to me like the same handwriting. I have also compared the manner in which the dates were written on those cards with the style of the date on each of the other cards specifically mentioned by Respondent in its supplemental brief. While there is some general resemblance, there are to my eye some dissimilarities too. I am not persuaded that the same hand wrote all these dates, particularly in the absence of any expert testimony thereon. Respondent has argued that Terry dated these cards and that his failure to admit doing so destroys his credibility on the alleged unfair labor practices. I see no merit in that contention.

The cross-examination of Terry at the resumed hearing respecting the events leading up to his discharge did not raise any substantial factual issues when viewed with the totality of the relevant evidence in the record. Thus, Respondent suggests that Terry was actively trying to have Taffner sign a card for the Union several days after Taffner was fired, and that Terry himself inserted an earlier date on that card and that Terry did this "during production time." All of these contentions are based on speculation and, in any event, Respondent could not have lawfully relied on its contention that Terry solicited Taffner's card during production time as a reason for discharging him in view of my other findings that Respondent unlawfully treated Terry in a disparate manner from antiunion employees.

Respondent did develop from Terry that he and Parisi had an argument on a personal matter which apparently took place months before Terry's discharge. That fact never was a matter that gave me pause. I find most implausible Parisi's testimony that somehow he brought that matter to the attention of Respondent's officials just prior to Terry's discharge, obviously in an effort to justify its being referred to as one of the reasons listed by Respondent for discharging Terry. Incidentally, I do not credit Parisi that Terry referred to him as a "guinea." At times in his cross-examination, Terry paused for what seemed to me to be inordinately long periods before responding to questions and I could not help but wonder if he was trying to recall the incident or his earlier testimony. It is my judgment that he was, on those occasions, trying to see if the question was loaded.[3] When answering questions pertaining to Parisi, Terry appeared to be straightforward in his account. Still, the significant point to the Parisi-Terry matter is the total implausibility of Parisi's account as to how he purportedly came to mention any aspect of that matter to Respondent's officials just prior to Terry's discharge and after so long a hiatus.

The record at the resumed hearing discloses that the date "February 8" was corrected to "March 8." It appears too that the incident involving Santisi and Terry respecting Taffner occurred on this day that Terry was discharged, March 9, and not on March 8. Respondent asserts that its president had decided on March 8 to discharge Terry and thus argues that he could not have considered the incident on March 9. I see little merit in that argument, since one of the reasons listed by Respondent's president for discharging Terry later on March 9 was that he was soliciting union cards during production time. To say now that that note did not in any way refer to the dispute Production Manager Santisi had with Terry but a few hours earlier is just not believable.

D. *Analysis*

As noted above, I denied what, in substance, was Respondent's motion that I disqualify myself on the ground that its cross-examination of Terry as to the alleged unfair labor practices came too late. That contention, it seems to me, is clearly without merit as Respondent's basic argument as to Terry's credibility is based on the manner in which it asserts he dated many of the Union's authorization cards. In fact, the logical extension of Respondent's basic argument is that any cross-examination of Terry would be unnecessary as anyone can see, simply by looking at the Union cards, that Terry had dated those cards. In any event, I am satisfied that the hiatus between Terry's direct examination on the alleged unfair labor practices had no impact on the ultimate merits of this case.

At the resumed hearing, I asked the parties to submit their views as to the merits of Terry's discharge under the *Wright Line* case,[4] if it was found that his use of the sign was not protected by the Act. I had made an alternate finding that that use was a protected activity. It was after my Decision issued that the *Wright Line* test was announced. It is now incumbent upon me to discuss its applicability so that the Board may have that matter available for consideration.

Based on the discussion above, I find that one of the reasons listed by Respondent for discharging Terry was his having solicited union cards during production time and, in view of the disparate treatment it showed to antiunion employees respecting the same type activities, I

[3] At one point Respondent asked Terry if it were true that he had testified previously that on a certain date he had several signs in his car. After reflections, Terry answered in the negative. The questions persisted until it developed that his earlier testimony was that Terry had prepared many signs and that on the day in question he had only one in his car.

[4] *Wright Line, a Division of Wright Line, Inc.*, 251 NLRB 1083 (1980).

am compelled to conclude that that conduct was a motivating factor in his discharge. The burden then has shifted to Respondent to demonstrate that it would have discharged Terry for the use of the sign (assuming that its use was unprotected) in the absence of the protected conduct. The timing of the discharge relative to the use of that sign, the volatile language of the sign itself, and even the testimony by Respondent's president (before *Wright Line* was published) that all the other reasons he listed for Terry's discharge, including those still urged by Respondent, had nothing to do with Terry's discharge which was based solely on his use of this sign all persuade me that Respondent has met its burden of demonstrating that Terry was discharged for his use of the sign, regardless of the activities obviously protected.[5] Thus, if the Board determines that the use of this sign was unprotected, it would then be my view that Terry's discharge would not be violative of the Act.[6] I see no basis, however, to find that that sign was unprotected[7] and thus I adhere to my original findings.[8]

Based upon the foregoing, I reaffirm the findings, conclusions, and recommended Order heretofore issued.

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[5] While Respondent's president may have tailored his answer to discount the fact that one of the reasons listed for Terry's discharge was his union activity during production time, I nevertheless credit it since other factors support it. Thus, despite Terry's soliciting union cards, he was granted an extended leave, he had been allowed to open the doors to the outside for ventilation (at least until he apparently overdid it), and he had not been discriminated against in any way until the sign incident.

[6] That determination would of course affect the Union's majority status.

[7] In its brief, Respondent described its size and color and referred to where it was displayed. I do not see those factors as a basis for removing the display of the sign from the protection of the Act.

[8] See also *Borman's, Inc.*, 254 NLRB 1023 (1981).